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Supreme Court, U.S.
FILED
FEB 12 2001
OFFICE OF THE CLERK

No. 00-1131

In The Supreme Court of the United States

SMURFIT-STONE CONTAINER CORPORATION, *Petitioner*,

v.

UNITED STATES, *Respondent*.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF AMICUS CURIAE NEW HOLLAND NORTH AMERICA, INC. IN SUPPORT OF PETITIONER

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28 pp

QUESTION PRESENTED

Whether the United States may constitutionally limit its refunds of taxes collected under an unconstitutional and void *ab initio* statute by the application of any statute of limitations?

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae New Holland North America, Inc. ("New Holland")[1] paid the Harbor Maintenance Tax ("HMT") on exports pursuant to 26 U.S.C. § 4461 and filed a claim in the U.S. Court of Federal Claims ("CFC") under the Tucker Act, 28 U.S.C. § 1491(a)(1). New Holland sought a refund of money paid under the HMT, alleging that the tax as applied to exports is unconstitutional as violative of the Export Clause of the United States Constitution. U.S. Const. art. I, § 9, cl.5. That case was transferred by the CFC to the U.S. Court of International Trade ("CIT"). New Holland's suit, along with all other HMT export refund cases, has been stayed pending resolution of this test case and related litigation.

In *United States v. United States Shoe Corporation*, this Court held that the HMT as it applied to exports was a violation of the Export Clause of the Constitution. 523 U.S. 360, 370 (1998). That decision, however, did not determine the appropriate remedy for the violation of the Export Clause. As a result, approximately 7,000 claimants, which have filed civil actions seeking to recover the unconstitutional HMT, have not received the full refunds to which they are entitled.

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, the party submitting this brief states that neither counsel for the United States nor counsel for the Smurfit-Stone Container Corporation in any way authored this brief, either in whole or in part, and no other person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of the brief. In addition, New Holland North America, Inc. has gained the consent of the United States Government and Smurfit-Stone Container Corporation to file an *amicus* brief in this case. Letters of consent are being filed with the Clerk.

Amicus and the other exporters whose cases have been stayed are similarly situated to Smurfit-Stone Container Corporation ("Petitioner"). The outcome of the present case will determine whether these exporters, including *Amicus*, are entitled to a full return of approximately $500,000,000 that was unconstitutionally collected from them. *See* Petition at 3.

STATEMENT

The question raised by the Petition - whether Tucker Act jurisdiction and its accompanying six-year statute of limitations should have been applied here - begs the predicate question of whether, given that the unconstitutional HMT on exports is void *ab initio*, any statute of limitations may constitutionally be applied to claims for refunds of the HMT on exports. That predicate question was addressed below by the Petitioner and by *Amicus*,[2] and was ruled on by the CIT and the U.S. Court of Appeals for the Federal Circuit ("CAFC").

Before the CIT, the "Petitioner argued . . . that Tucker Act Jurisdiction (28 U.S.C. § 1491 (a)(1)) existed under established Supreme Court precedent not addressed by this Court in *United States Shoe* and requested the CIT to transfer part of its case to the CFC. Petitioner also asserted it was entitled to refunds of all the unconstitutional taxes it had paid. Alternatively, if a

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[2] New Holland North America, Inc., Steelmet, Inc., *et al.*, The National Industrial Transportation League, and Addison Wesley Longman, *et al.* filed *Amicus* briefs in *Stone Container Corp. v. United States*, 229 F.3d 1345 (Fed. Cir. 2000); New Holland North America, Inc. filed an *Amicus* brief in *Stone Container Corp. v. U.S.*, 27 F. Supp.2d 195 (Ct. of Int' l Trade 1998).

statute of limitations applied to Petitioner's action, Petitioner maintained that Customs owed additional refunds due to the '*American Pipe*' tolling created by the filing of a class action in *Baxter Healthcare v. United States*." Petition at 6 (citations omitted) (emphasis in original). In response, the CIT held:

> Governmental entities may create statutes of limitation for any type of claim against any defendant in order to avoid stale claims and to increase certainty. In *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco,* the Supreme Court required Florida to provide a clear remedy for recovery of improperly exacted taxes, but it did not require an unlimited remedy. The same rule should apply to the federal government.

Stone Container Corp. v. United States, 27 F. Supp.2d 195, 198 (Ct. Int'l Trade 1998) (citation omitted).

On appeal to the CAFC, the Petitioner argued "it is unconstitutional to apply any statute of limitations to refund claims with respect to an unconstitutional tax." *Stone Container Corp. v. United States*, 229 F.3d 1345, 1349 (Fed. Cir. 2000). The court responded, on the basis of dictum in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), that enforcing a statute of limitations in suits to recover payment of unconstitutional taxes was not unconstitutional. *Stone Container Corp.*, 229 F.3d at 1349.

Although Petitioner has not requested review of these rulings, *see* Pet. at 7, n.4, *Amicus* respectfully submits - on behalf of itself and the thousands of others similarly situated - that, for the reasons advanced in the following sections, this Court should first reach and

resolve the issue of whether any statute of limitations may constitutionally be applied in the circumstances of this void *ab initio* statute before turning to the issue raised by the Petitioner concerning the applicability of the statute of limitations normally applied to claims involving unconstitutional takings. Accordingly, *Amicus* urges the Court both to accept the petition and to direct consideration of the question here presented in addition to the question directly presented by Petitioner.

REASONS FOR GRANTING THE WRIT

I. The HMT is Unconstitutional and Void *Ab Initio* and, Consequently, no Statute of Limitations Should Apply to Prevent Full Recovery by the Petitioner

A. This Issue is Squarely Presented for Review

Whether the government may employ a statute of limitations that restricts the refund of federal taxes collected under an unconstitutional statute that is void *ab initio* is a predicate question which ought to be fully considered by this Court before reaching the question presented by the Petitioner. The predicate question is squarely presented by this case: all parties and both lower courts addressed the potential unconstitutionality of the imposition of any statute of limitations on refunds of the HMT.

B. The HMT on Exports is Unconstitutional and Void *Ab Initio*

The HMT on exports was enacted and enforced in violation of the Constitution. The determination by this

Court that the HMT on exports is unconstitutional renders the HMT void *ab initio*. *See Chicago, I. & L. R. Co. v. Hackett*, 228 U.S. 559, 566 (1913) ("[A]n invalid exercise of the power of Congress . . . [is] as inoperative as if it had never been passed . . . ."); *Fairbank v. United States*, 181 U.S. 283, 286 (1901) ("The particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void . . . .") (citations omitted); *Ex Parte Siebold*, 100 U.S. 371, 376 (1879) ("An unconstitutional law is void, and is as no law.").

This Court's precedent directs that decisions on questions of constitutionality must be given retroactive effect. *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993) (recognizing a general rule of retrospective effect for the constitutionality decisions of the Supreme Court). Therefore, a decision by the Court that a tax is unconstitutional must be given retroactive effect, and the remedies available to the taxpayer may not be limited by a merely prospective application of that decision. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 534 (1991); *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 22 (1990); *Harper v. Virginia Dep't. of Taxation*, 509 U.S. 86, 100 (1993). In rejecting prospective relief as insufficient, these decisions confirm that when a law is declared unconstitutional, it is void *ab initio*, and, therefore, all actions taken pursuant to that law are similarly void and must be undone.

Due process mandates that the Government "undo" an unconstitutional tax by providing a refund. In *McKesson*, in response to the question of whether "prospective relief, by itself, exhausts the requirements of federal law," the Court determined that:

> [t]he answer is no: If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a post payment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

McKesson, 496 U.S. at 31 (footnote omitted). Therefore, the judicial determination that the HMT on exports is void *ab initio* is not sufficient as a matter of law; the Government must provide meaningful backward-looking relief. To ensure that the HMT on exports is indeed treated as void from its inception, the Government must provide the only meaningful backward-looking relief available - a full refund of all unlawfully-collected HMT.

C. Due Process Mandates a Full Recovery for the Plaintiffs in This Case

The Fifth and Fourteenth Amendments guarantee that no person shall be deprived of life, liberty, or property without due process of law. *See, e.g., DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 196 (1989) ("Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression . . . .'") (citations omitted). The collection of taxes implicates a property interest within the meaning of the Fifth and the Fourteenth Amendments. *See Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930).

Accordingly, a denial of a full recovery of taxes exacted by compulsion in direct violation of an express provision of the Constitution is itself a violation of the Constitution.[3] *See Reich v. Collins*, 513 U.S. 106, 109 (1994) ("'[A] denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment' . . . .") (citations omitted); *Ward v. Love County*, 253 U.S. 17, 24 (1920) ("To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment.").

Due process therefore mandates a "'clear and certain' remedy for taxes collected in violation of federal law." *Reich*, 513 U.S. at 108. Where there is no provision for predeprivation relief from an unconstitutional tax, the post-deprivation remedy must satisfy the due process requirements of the Constitution. *See McKesson*, 496 U.S. at 38-39. Post-deprivation relief for an unlawful tax must consist of meaningful backward-looking relief. *See Harper*, 509 U.S. at 101. To satisfy the Due Process Clause, the post-deprivation remedy must not only provide petitioner with "an opportunity to contest the

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[3] The HMT is a tax exacted by compulsion. An exporter or shipper who fails to pay the HMT is subject to penalties in the form of financial sanctions. 19 C.F.R. § 24.24(h) (1995). *See McKesson*, 496 U.S. at 38 n.21 (" We have long held that, when a tax is paid in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid under 'dure ss' in the sense that the State has not provided a fair and meaningful predeprivation procedure.").

validity of the tax," but it must also provide a "'clear and certain remedy' designed to render the opportunity meaningful by preventing any permanent unlawful deprivation of property." *McKesson*, 496 U.S. at 40, *citing Reich*, 513 U.S. at 108.

In particular, the application of a statute of limitations is subject to Constitutional restrictions. *See James B. Beam Distilling Co.*, 501 U.S. at 535 ("Subject to possible constitutional thresholds . . . the remedial inquiry is one governed by state law, at least where the case originates in state court.") (emphasis added) (citations omitted). Indeed, a statute of limitations may not be applied if that application violates the Constitution:

> But what if a pre-existing, separate, independent rule of state law . . . a rule containing certain procedural requirements for any refund suit - nonetheless barred the taxpayers' refund suit? . . . Depending upon whether or not this independent rule satisfied other provisions of the Constitution, it could independently bar the taxpayers' refund claim.

Reynoldsville, 514 U.S. at 756 (emphasis added) (citations omitted).

In this case, where the constitutional violation is not merely a question of unequal or discriminatory enforcement of a tax in practice, but the attempted usurpation by Congress of a power (to tax exports) directly forbidden it by the explicit text of the Constitution, the application of any statute of limitations to bar a full recovery of all HMT unlawfully collected would violate the Due Process Clause. To allow the

federal Government to keep the unconstitutionally imposed HMT by application of a statute of limitations would thus permit the Government to violate the Constitution a second time, by keeping funds which it has no constitutional power to hold. Such application would not provide an adequate and fair remedy to the unconstitutional exaction of the HMT. To the contrary, it would entail the "permanent unlawful deprivation of property." *McKesson*, 496 U.S. at 40.

Therefore, the Government should not be permitted to impose and collect the unconstitutional HMT and then rely on a statute of limitations to bar a full refund of the HMT.

D. There is No Precedent to Support the Application of the Two-Year Statute of Limitations to Deny Recovery of Federal Taxes Exacted by Compulsion in Violation of the Constitution

The CAFC relied on three cases in support of its holding that the two-year statute of limitations in 28 U.S.C. § 2636(i) applied to the unconstitutional HMT and barred recovery of HMT on exports paid more than two years prior to the date the original action was filed in the CIT: *Block v. North Dakota*, 461 U.S. 273 (1983), *United States v. Dalm*, 494 U.S. 596 (1990), and *Boling v. United* States, 220 F.3d 1365 (Fed. Cir. 2000). The CAFC cited these three decisions for the proposition that, when a statute is deemed unconstitutional and, as a result, a remedy is due, an applicable statute of limitations may dictate the time by which a suit for relief must be brought. The decisions in *Block*, *Dalm*, and *Boling*, however, do not in fact answer the question of what is constitutionally required in order to remedy the effect of

an unconstitutional law; thus, they are irrelevant to the matter now before the Court. *See U.S. Shoe Corp. v. United States*, 907 F. Supp. 408, 426 (Ct. Int'l Trade 1995) (Musgrave, J., concurring). More particularly, those decisions make no attempt to address the question of the constitutionally-required remedy for a law passed by Congress in knowing disregard of an express textual Constitutional prohibition.

1. Block v. North Dakota

In *Block v. North Dakota*, the Court held that the Quiet Title Act was the exclusive means by which an individual could challenge the title of the United States to real property. *Block v. North Dakota*, 461 U.S. at 277. Further, the Court held that the statute of limitations provided by the Quiet Title Act was not unconstitutional because it merely limited the time during which a suit could be brought and did not actually deprive anyone of his or her property rights. *Id.* at 291. The CAFC relied on *Block* for the proposition that imposing a statute of limitations on Smurfit-Stone Container did not amount to a deprivation of property without due process. *Stone Container Corp.*, 229 F.3d at 1350.

The CAFC's analysis, however, goes beyond what *Block* actually held. In *Block*, the Court did not reach the question of whether the Government may retain revenue exacted pursuant to an *unconstitutional* statute that is void *ab initio*. The Court did not find the underlying law (the Quiet Title Act) unconstitutional and, thus, the Court's decision does not address the implications of the application of a statute of limitations to recovery of amounts paid pursuant to the mandate of an unconstitutional statute. Instead, the Court discussed the assertion of constitutional rights in relation to a constitutional statute, and whether such rights are

subject to procedural limitations, the constitutionality of which was not discussed.

It is not surprising that the Court applied the statute of limitations in *Block*. It logically follows that a statute of limitations would continue to apply to a constitutional law. It does not, however, necessarily follow from the decision in *Block* that, if a law is held to be unconstitutional and is, therefore, ignored by the Court, that a statute of limitations would apply, or would apply in the same way, as if the law were constitutional.

2. United States v. Dalm

As with *Block*, the lower court misapplied the holding in *United States v. Dalm*. 494 U.S. 596 (1990). In *Dalm*, the respondent received a sum of money from an estate that she administered; both income and gift taxes were assessed on the money, and she petitioned the Tax Court for a redetermination of the income tax. She made no claim, however, for a credit or recoupment of the gift tax that was paid. *Id.* at 599. The respondent later filed a claim to recover the gift tax on the theory of equitable recovery, but she did so beyond the applicable statute of limitations. *Id.* at 599-600. The Court held that the statute of limitations applied to bar the recovery of the gift tax because the respondent had previously chosen to litigate the claim under a different theory, with no mention of the gift tax, and had simply failed to achieve a desirable outcome. *Id.* at 611.

Thus, in *Dalm*, no statute was deemed unconstitutional. Although the Court in *Dalm* applied a statute of limitations to the claim, it did so only after the respondent had been given a full and fair opportunity to litigate and recover on all of her claims in the first instance. In neither *Dalm* nor *Block* were the parties

permanently deprived of any property by the government pursuant to an unconstitutional statute that was void *ab initio*.

3. Boling v. United States

The CAFC also cited one of its own decisions, which was not the subject of a petition filed in this Court, for the proposition that "the federal government may apply statutes of limitations to just compensation claims." *Stone Container Corp.*, 229 F.3d at 1350.

In *Boling*, the plaintiff brought a takings claim for land that was eroded after an artificial waterway was constructed by the government. The court held that the claim was barred by the six-year statute of limitations of the Tucker Act, which, it noted, applies to instances when the government fails to provide just compensation for the taking of private property. *Boling v. United States*, 220 F.3d at 1370. The court held that the claim was beyond the statute of limitations because the accrual date for the taking was the moment that erosion damage occurred, which they set at the time the waterway began to function. *Id.* at 1369. The damage had begun more than six years prior to the initiation of the claim and, thus, the claim was barred by the statute of limitations.

Boling is almost entirely devoted to the issue of accrual and equitable tolling, and only minimally discusses the principle for which it is cited in *Stone Container*. While the court holds that the statute of limitations applies to bar a claim in *Boling* for an unconstitutional taking, there again was no underlying

statute that was held unconstitutional.[4]

E. The Lower Court Misinterpreted and Misapplied *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*

McKesson stands for the proposition that, under the Fourteenth Amendment, the government is obligated to provide "meaningful" retroactive compensation for a tax that is deemed unconstitutional.[5] The holding in *McKesson* - that due process obligates a government to provide meaningful backward-looking relief to rectify any unconstitutional deprivation - governs the instant action. The CAFC, however, looked not to the principle elucidated in *McKesson*, but to *dictum* indicating that the

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[4] *Boling* supports the position taken by Petitioner in this case because, in *Boling*, the CAFC recognizes that the Tucker Act statute of limitations applies in takings cases. At a minimum, this Court should hold that the Tucker Act statute of limitations applies to the takings that occurred under the HMT, if any statute of limitations applies at all.

[5] This Court summarized the case as follows:

> The question before us is whether prospective relief, by itself, exhausts the requirements of federal law. The answer is no: If a state places a taxpayer under duress promptly to pay a tax when due and relegates him to a post-payment refund action in which he can challenge the tax' s legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

McKesson, 496 U.S. at 31.

state might "enforce relatively short statutes of limitations applicable to such actions." *McKesson*, 496 U.S. at 45. That *dictum* in *McKesson*, however, is not relevant to the instant case because it was based on principles of federalism and comity and the traditional federal deference to state tax administration.[6] In the instant action, there are no state interests present, and there is no corollary requirement for comity or federal deference to state interests. Thus, the *dictum* in *McKesson* is completely inapplicable to the "case, matter, and circumstances involved" in the instant action. *McKesson*, 496 U.S. at 45; *see also Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 754-55 (1995) ("[The] remedy . . . depend[s] - like almost all legal issues - upon the kind of case, matter, and circumstances involved. Not all cases concerning retroactivity and remedies are of the same sort.").

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[6] In *National Private Truck Council v. Oklahoma Tax Comm' n*, this Court held:

> We have long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration.
>
> . . . .
>
> The reluctance to interfere with state tax collection continued in [*McKesson*], in which we confirmed that the States are afforded great flexibility in satisfying the requirements of due process in the field of taxation.

515 U.S. 582, 586-587 (1995) (emphasis added); *see also Harvard Law Review Association, The Supreme Court, 1989 Term: Leading Cases*, 104 Harv. L. Rev. 188, 194 (1990) (" [*McKesson*] may represent the greatest deference to state interests permissible in a regime that requires the vindication of federal rights.").

The *dictum* in *McKesson* should be further distinguished because *McKesson* addressed the unconstitutional enforcement of an otherwise constitutional tax. In contrast, the remedy in the instant action must address the unconstitutionality of a statute or provision that is void *ab initio*. The inapplicability of this *dictum* to situations of *ab initio* unconstitutionality is discussed in *McKesson*:

> Had the Florida courts declared the Liquor Tax invalid either because (other than its discriminatory nature) it was beyond the State's power to impose . . . because the taxpayers were absolutely immune from the tax . . . no corrective action by the State could cure the invalidity of the tax during the contested tax period. The State would have had no choice but to "undo" the unlawful deprivation by refunding the tax previously paid under duress, because allowing the State to "collect these unlawful taxes by coercive means and not incur any obligation to pay them back . . . would be in contravention of the Fourteenth Amendment."

McKesson, 496 U.S. at 39 (emphasis added), *citing Ward v. Love County*, 253 U.S. 17, 24 (1920), and *Carpenter v. Shaw*, 280 U.S. 363, 369 (1930). To demonstrate and support this proposition, the Court cited several examples in which it denied the constitutionality of the taxes imposed under a statute. In each case, the Court required the state to refund all of the unconstitutional taxes collected. *See Atchison, T & S.F.R. Co. v. O'Connor*, 230 U.S. 280 (1912) (*cited in McKesson*, 496 U.S. at 32); *Ward*, 253 U.S. at 24 (*cited* in *McKesson*, 496 U.S. at 33, 39); *Montana National Bank of Billings v. Yellowstone County*, 276 U.S. 499 (1928) (*cited in McKesson*, 496 U.S. at 34-35).

II. No Statute of Limitations Should Prevent the Recovery of Property Taken by the Government Under a Law that Congress Enacted with Knowledge that it Was In Violation of the Constitution

The unique circumstances of this case warrant a unique ruling: that no statute of limitations should bar the claims of exporters to recover the unconstitutionally collected HMT. First, when Congress enacted the HMT and applied it to exports, it knowingly violated the express prohibition of the Export Clause of the Constitution and arrogated to itself a power which the Constitution explicitly denies it.[7] Second, although Congress

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[7] The report of the House Committee on Merchant Marine and Fisheries stated that " Article 1, section 9, clause 5 of the Constitution provides 'no tax or duty shall be laid on articles exported from any State.' This is the only limitation on the otherwise plenary taxing authority of the Congress under Article 1, section 8, clause 1 of the Constitution. The Supreme Court has historically and consistently ruled against legislative attempts to directly or indirectly impose such levies. Whether characterized as a tax or a fee, to the extent that such a levy is construed as primarily for the purpose of revenue raising, it is tantamount to a tax on export and in part unconstitutional. [Footnote omitted]." In the section titled " Additional Views," the report stated, " . . . I continue to hold grave reservations concerning the constitutionality and policy implications of an *ad valorem* fee. First, in my judgment there is no intrinsic relationship between the imposition of a fee on cargo for port dredging services based exclusively on cargo value and the value of services provided. A tax by under any other name remains a tax. The research performed, by and at the Committee' s request, only strengthens my convictions in this regard." H.R. Rep. No. 251(IV), 99th Cong., 1st Sess. 23, 41 (1985) (A102) (A103) (statement of Representative Biaggi in Additional History).

designated the application of the HMT to exports as a "tax, " Congress designed the law in such a way that the CIT was found by this Court to have exclusive jurisdiction over claims involving the HMT, thus, rendering a two-year statute of limitations apparently applicable to all such claims. *See* 26 U.S.C. § 4461 (c)(1); 28 U.S.C. § 2636(i); *see also* S.Rep. No. 228, 99th Cong., 1st Sess. 10 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6705, 6714-15. This course of action resulted in a blatant unconstitutional taking of property, and did not even allow the normal six years to bring an action that otherwise is allowed for unconstitutional takings. 28 U.S.C. § 2501.

Those who were harmed by the taking that resulted from the imposition of the HMT on exports should be permitted to recover in full - without the application of any statute of limitations - that which was taken, as a remedy for the calculated violation of the Constitution by Congress in enacting and implementing the law. Any lesser remedy fails to correct the constitutional violation, where the Government has exacted and continues to hold revenues it had no power to take or to keep.[8]

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[8] In his concurring opinion in *United States Shoe Corp. v. United States*, Judge Musgrave of the CIT urged that court to observe a hard and fast rule against this type of Congressional action:

> While valid claims based upon unconstitutional acts by the federal government may at some time become stale or deemed waived, an attempt, as here, at interposing a very short statute of limitations runs afoul of due process and flaunts the sovereign' s role as, among other things, protector of rights of its citizens, from whom this government, almost uniquely when it was created, acquired all of its powers. And here, the

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Moreover, the Court's adoption of a rule that prevents the application of a statute of limitations in this case would not release the floodgates on untimely takings suits. Rather, the ruling can and should be limited in scope to the unique circumstances of this case, where the taking occurred despite an explicit, textual limitation in the Constitution on the power of Congress, as well as Congress' knowledge of its violation of the Constitution. Under the specific facts and circumstances presented in this case, there can be no valid application of a statute of limitations, in that the Government never had, and does not now have, any power to take or to hold the property in question. By denying the application of a statute of limitations in this particular case, the Court will send a clear message to Congress that the federal Government may not "profit" in any way when it ignores the express provisions of the Constitution on the limitations of its power.

III. If Any Statute of Limitations Applies in *Stone Container*, it is the Tucker Act

In this particular case, once the HMT, as it applied to exports, was ruled unconstitutional and became void *ab initio*, the "tax" on exports ceased to be a valid tax, retroactive to the moment of its creation. As a result, all

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> legislative history reflects that the drafters of the Act were abundantly aware of the constitutional infirmity of the Act; this being true, enforcing the foreshortened statute of limitations is to reward the perpetration of an overtly unconstitutional act.

United States Shoe Corp., 907 F. Supp. at 424 (Musgrave, J., concurring).

monies exacted under the HMT on exports became at best a governmental taking of private property for public use. *See Reynoldsville*, 514 U.S. at 760 (1995) (Scalia, J., concurring) ("[I]f a plaintiff seeks the return of money taken by the government in reliance on an unconstitutional tax law, the court ignores the tax law, finds the taking of the property therefore wrongful, and provides a remedy."). As such, regardless of whether the CIT or the CFC has jurisdiction over a suit to reclaim the property taken, if any statute of limitations is to apply, it should be the six-year statute of limitations normally applicable to claims of unconstitutional takings, rather than a less specific statute of limitations that is tied only to the residual jurisdiction of a particular court.[9] Accordingly, as urged by Petitioner, if any statute of limitations may constitutionally be applied here, it is the six-year statute which applies to takings claims, and not a more limited statute designed to apply to "taxes" on imports, no matter which court has jurisdiction over the suit.

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[9] The HMT was properly analyzed as an attempted " tax", for all the reasons stated by the Court in *United States v. United States Shoe*, but it does not remain a tax after that holding; rather it " is as no law." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. at 760 (Scalia, J., concurring), *citing Ex Parte Seibold*, 100 U.S. at 376.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully requests the Court to grant the petition, and also to order consideration of the predicate question presented by *Amicus* here.

Respectfully submitted,

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DATED: February 12, 2001